

LIBRARY
SUPREME COURT, U. S.

FILED
APR 9 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1205

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF OF RESPONDENT ON PETITIONER'S PETITION FOR WRIT OF CERTIORARI

AARON E. KOOTA
District Attorney Kings County
Municipal Building
Brooklyn 1, New York
Attorney for Respondent

STANLEY M. MEYER
Assistant District Attorney
of Counsel

To:

EDWYN SILBERLING
1501 Franklin Avenue
Mineola, New York 11501

BERNARD A. BERKMAN
LARRY S. GORDON
JOSHVA J. KARCELBAUM
GERALD A. MESSERMAN
1320 Superior Building
Cleveland, Ohio 44114

32 CASE PRESS INC., 421 HUDSON ST., N.Y.—ORegon 5-4540

TABLE OF CONTENTS

	PAGE
Previous Proceedings	1
POINT I—Respondent agrees with petitioner that a writ of certiorari be granted. It is important for the State of New York as well as other states to know whether *Spevak* v. *Klein*, 385 U.S. 511 is retroactive and whether any records kept by attorneys may be properly subpoenaed	3
POINT II—Petitioner was not denied due process of law but was given all procedural requisites inherent in the concept of a fair hearing as applicable to proceedings of this type	5
POINT III—The findings of the Special Referee were not improper	10
CONCLUSION	12

AUTHORITIES CITED

Cases

Ames v. Dubinsky, 70 N.Y.S. 2d 706	9
Bradley v. Fisher, 13 Wall 335, 80 U.S. 335	10
Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 81 S. Ct. 1743	5
Cohen v. Hurley, 366 U.S. 117	3, 6
Ex Parte Wall, 107 U.S. 265	5-6, 9, 10
Greene v. McElroy, 360 U.S. 474, 79 S. Ct. 1400	11
In re Oliver, 333 U.S. 257	11
Justice v. Lang, 52 N.Y. 323	11

PAGE

Malloy v. Hogan, 378 U.S. 1, 84 S. Ct. 1489 10
Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684 9
Matter of Broome, 13 A.D. 2d 657 ..... 9, 11
Matter of Kaplan, 13 A.D. 2d 231 9
Matter of Mogel, 18 A.D. 2d 203 ..... 6, 9, 11

People v. Loria, 10 N.Y. 2d 368, 179 N.E. 2d 478 9
People v. Terra, 303 N.Y. 332, 102 N.E. 2d 576 11

Randall v. Brigham, 74 U.S. 532 6

Sackler v. Sackler, 15 N.Y. 2d 40 9
Shapiro v. United States, 335 U.S. 1 4
Sharkey v. Thurston, 268 N.Y. 23, 196 N.E. 766 9
Spevak v. Klein, 385 U.S. 511 ..... 3, 4, 5

Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241 11

IN THE

Supreme Court of the United States

October Term, 1967

No.

DAVID A. GOLDNER,

Petitioner,

—against—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

BRIEF ON BEHALF OF RESPONDENT

Petitioner seeks a Writ of Certiorari in order to review a judgment of the Court of Appeals of the State of New York, entered on December 7, 1967 amending the judgment of the Court of Appeals entered on March 26, 1964, which affirmed an order of the Supreme Court of the State of New York, Appellate Division, Second Department, dated December 27, 1961 (15 A.D. 2d 558) disbarring Petitioner and ordering his name stricken from the roll of attorneys. A previous application for a Writ of Certiorari was denied by this Court at 379 U.S. 959 (1965) and a petition for rehearing was denied at 380 U.S. 926.

Previous Proceedings

The proceedings below were begun by a petition of Edward S. Silver, District Attorney of Kings County, verified on July 15, 1960, charging petitioner with 33 acts

of misconduct, the issues having been then referred to Hon. J. Irwin Shapiro, Special Referee, to hear and report, together with his recommendations, by order of the Appellate Division dated October 31, 1960.

The Special Referee heard testimony from December 1, 1960, to December 7, 1960, and filed his report, dated March 6, 1961, in which he made four conclusions and recommended disbarment. The motion to confirm the Special Referee's report was granted thereby causing petitioner's disbarment and a motion to stay respondent's motion to confirm the Referee's report was denied on June 21, 1961. Petitioner moved to set aside the report of the Referee which was denied by order dated September 21, 1961, reargument of which was denied by order dated October 5, 1961. A further motion for reargument and reconsideration was denied on May 13, 1963. The Court of Appeals of the State of New York affirmed the order of disbarment without opinion on March 26, 1964 (14 N.Y. 2d 593). This Court denied an application for a Writ of Certiorari at 379 U.S. 959 and an application for rehearing was denied at 380 U.S. 926. The remittitur was amended by the Court of Appeals of the State of New York on December 7, 1967. It provided that there was no violation of petitioner's constitutional rights guaranteed him by the Constitution of the United States.

Prior to the institution of the proceedings before Hon. J. Irwin Shapiro, the Judicial Inquiry conducted an investigation in 1958, at which petitioner appeared and testified on two occasions and to which he delivered financial books and records pursuant to a subpoena *duces tecum*. These books and records were not physically returned until after the conclusion of the proceedings before the Special

Referee. The subject under investigation was solicitation and related unethical practices in Kings County. Petitioner moved for the return of his records in November, 1958, in the Appellate Division and in January, 1959, before the Special Term of the Supreme Court. Both motions were denied.

Regarding the hearing before the Special Referee, petitioner was represented by counsel, presented evidence, cross-examined witnesses, was given many months to prepare his case and was served with formal charges and particulars of the charges. Not once during the hearing did petitioner object, complain, ask for an adjournment or raise the issue that the retention of his records was illegal or that he had been prevented from preparing his defense. He never alleged that he was prevented from copying, using or working with his records.

POINT I

Respondent agrees with petitioner that a writ of certiorari be granted. It is important for the State of New York as well as other states to know whether *Spevak* v. *Klein*, 385 U.S. 511 is retroactive and whether any records kept by attorneys may be properly subpoenaed.

When the case at bar originally made its way through the New York Appellate Courts and even when the application for a Writ of Certiorari was made to this Court, *Spevak* v. *Klein*, 385 U.S. 511, had not yet been decided and *Cohen* v. *Hurley*, 366 U.S. 117, expressed the existing law. Examination of the terms of the subpoena in this case (appendix A. p.1a) shows that the subpoena was as broad

as that referred to by this Court in the *Spevak* decision. Thus, had *Spevak* been decided at the time the subpoena was issued, petitioner may have had the right to refuse to turn over a good deal of the records and data requested. In *Spevak,* the grounds of disbarment however was the refusal to comply and the invocation of the privilege of self-incrimination. Here, the petitioner did comply and actually turned over the records, conduct which, respondent submits, raises another important issue. This Court, in the *Spevak* majority opinion indicated that consideration of the question of whether certain types of records under the authority of *Shapiro* v. *United States,* 335 U.S. 1 might not be covered by the privilege was not necessary to its decision since the attorney had been disbarred for merely raising the privilege. Mr. Justice Fortas in his concurring opinion indicated that he might have voted for affirmance had the case presented the question of whether an attorney might be disbarred for refusal to produce records he was required lawfully to keep as a proper part of his being a licensee in a high calling. In addition, three Justices dissented and took the position that disbarment under the circumstances of the case was constitutionally permissible.

In the case at bar, respondent thinks that the scope and application of the *Shapiro* principle is presented. This is true because although the subpoena appears, by the decision in *Spevak,* to have been too broad, respondent will argue that the records actually used against petitioner at the disciplinary hearings related only to his function as an attorney with relation to specific cases he handled and would properly be the subject of a subpoena even today. The use of these records constituted no harm.

Of course the issue of whether petitioner can take advantage of the decision of *Spevak* v. *Klein, supra,* even if it applied and would have forbidden use of any of the records used at the hearing, at this time, long after all appellate remedies have been exhausted, is also an important issue.

The two issues, the applicability of *Spevak* to proceedings already concluded and the relevance of the privilege of self-incrimination to non-personal, relevant, business records of an attorney seem to make it desirable to all parties to this controversy that the writ prayed for be granted. The position of respondent by no means is an indication that respondent believes however that the case should be reversed.

POINT II

Petitioner was not denied due process of law but was given all procedural requisites inherent in the concept of a fair hearing as applicable to proceedings of this type.

The soundness of the legal basis of the disciplinary proceedings in this case being unassailable, the question arises as to what standards of due process must be afforded a respondent. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation but is unfixed and based upon considerations of time, history, reason and past course of decisions. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886, 81 S. Ct. 1743. Disciplinary proceedings not being penal in nature, it has been held that they need not be formal, nor does the burden of proof beyond a reasonable doubt exist. *Ex Parte Wall,*

107 U.S. 265; *Randall* v. *Brigham*, 74 U.S. 532; *Matter of Mogel*, 18 A.D. 2d 203. Procedures can be adopted which considered as a whole in view of the nature of the proceedings may be different from those normally required in criminal prosecutions. *Cohen* v. *Hurley*, 366 U.S. 117.

Petitioner complains that his books and records were not physically returned to him prior to the hearings before the Referee thus depriving him of an opportunity to prepare a defense, a right which is concededly included in the concept of fair procedure. The right to which he is entitled though is the opportunity to prepare a defense or explanation and if he is not handicapped in doing so even though his books may be retained illegally, which we argue was not the case here, his rights of due process are not violated. Petitioner bases his contention that the books were illegally retained on his position that no order existed sanctioning the impounding of such records. Yet, he states that he moved for their return in the Appellate Division and then in the Supreme Court, both motions having been denied. It is an exercise in semantics to say that an order denying the request for the return of the books should be viewed differently than one authorizing their retention. The only difference between the two is the identity of the party initiating the motion, the issues litigated and the principles considered therein being the same. The denial of these motions were sufficient authority for retention of the records, if such authority be required by way of Court Order. Implicit in petitioner's argument that no order existed for the retention of his records must be the recognition, which is founded on law, that retention would be proper under certain circumstances. It is not true then that where such records will be

offered in an anticipated disciplinary proceeding involving the special relation of an attorney to the public that there is a duty to retain them? There was ample justification for scrutinizing these records and judicial grounds for keeping them.

It is paramount to remember that petitioner's essential claim is really not that the refusal to return his books constitutes deprivation of his constitutional rights but that his right to prepare his defense was interferred with by their retention. Assuming arguendo that it could be concluded that petitioner, although he did not have physical possession of these records, did have the opportunity to examine them, work with them and copy them, his right to prepare his defense would have remained inviolate. What then occurred in the case at bar? Nowhere does petitioner claim that he was ever denied access to these books and nowhere does he deny that he or his representatives were allowed to work with them. This omission speaks volumes, for the concept of due process does not dictate that a person make use of his opportunity, but only that it be available to him. This is not only true if petitioner did not make use of this opportunity but more so if he did. Petitioner has also not shown how the physical retention of these records have handicapped him. The fact is, the only demand petitioner ever made, via motion and letter, (SR. 181-183) was for the physical return of these records. He never asked according to this record, that he be allowed to use, work with, or copy them. Likewise, at the outset of the hearing no objection was made nor was this issue raised in any form. At the beginning of petitioner's case (H. 388) nothing was said, nor was objection made when petitioner himself testified (H. 425). There was no objection made when the

accountant for the petitioner below testified (H. 210) nor when he referred to these records. Neither was a question raised when the accountant referred to his work sheets (H. 215) although he testified at great length. Actually, petitioner was prepared to meet the testimony of the District Attorney's expert because petitioner introduced much documentary evidence in an effort to dispel the statements of the accountant (H. 450, 452-57, 464, 471, 483, 493) and testified at great length regarding his checks (H. 755-57). Petitioner was first apprised of the areas into which investigation was being conducted by his questioning at the Judicial Inquiry and was later specifically advised by the specifications and bill of particulars served on him. He was given exact notice of the charges against him and had many months to prepare his case. The record of the hearings shows that he did so. He introduced evidence, called witnesses, cross-examined and was afforded every opportunity to controvert or explain the charges. He never raised his claim that he had been deprived of an opportunity to prepare a defense nor asked for an adjournment at any point in the hearings. There is no doubt that Special Referee Shapiro would have accommodated him had such a request been made. Even after the hearings were completed when the Referee gave petitioner time to submit a brief this issue was not raised (H. 781-82).

Petitioner sought to demonstrate below that the retention of his records handicapped him by arguing that he could have explained the division of settlement monies regarding a client named Dascoli. This argument was not new and was made in the same language by him at the hearing (H. 276). An examination of the records in this case will show that this holds true regarding all of the items

testified to by the expert witness. Petitioner has failed to show below that any information he could have learned from these records, if in fact he didn't examine them, would have altered in any way anything that occurred at the hearing.

A complete opportunity was presented petitioner to defend these proceedings including all elements of fair procedure and notice applicable to actions of this type. He did not raise his claim at any time during the hearings and did not show how he has been prejudiced.

The retention of petitioner's records could not constitute an illegal search or seizure since this was not a criminal proceeding. *Sackler* v. *Sackler,* 15 N.Y. 2d 40. More protection was given to petitioner in terms of procedure calculated to provide him with a fair hearing than has been required by law. *Sharkey* v. *Thurston,* 268 N.Y. 23, 196 N.E. 766; *Ex Parte Wall, supra; Matter of Mogel, supra; Ames* v. *Dubinsky,* 70 N.Y.S. 2d 706; *Cohen* v. *Hurley, supra; Matter of Broome,* 13 A.D. 2d 657; *Matter of Kaplan,* 13 A.D. 2d 231.

It is alleged that *Mapp* v. *Ohio,* 367 U.S. 643, 81 S. Ct. 1684 was decided after petitioner's disbarment but before the pending appeal was decided and that whether the decision is to be applied retroactive to this case is an issue here. Further it is claimed that a retroactive application would dictate a reversal. This is plainly not so. The Court of Appeals has already decided that *Mapp* is to be applied to all cases in New York where appeals are still pending, *People* v. *Loria,* 10 N.Y. 2d 368, 179 N.E. 2d 478 and since *Mapp* was actually discussed in the briefs and upon argument in that Court in this case, it is evident that the Court of Appeals considered whether the obtaining and retention

of petitioner's records constituted an illegal search and seizure. *Malloy* v. *Hogan,* 378 U.S. 1, 84 S. Ct. 1489 is not really applicable because in this case petitioner never refused to answer questions or give evidence on the grounds of self-incrimination and the basis for disbarment was not the same.

No privilege or claim was raised at any stage of the proceedings and no showing of a lack of reasonable opportunity to prepare a defense, which concededly is due petitioner, has ever been shown. The high duty owed by an attorney to the judiciary as well as the logical and well founded view of the proceedings below as being non criminal sustain the legality of requiring disclosures such as were actually used in the hearings below.

POINT III

The findings of the Special Referee were not improper.

The third and fourth findings of the Special Referee it is claimed were objectionable because petitioner had no notice of them. This is not improper because the Referee had no way of foretelling prior to the hearing that the circumstances would occur that would support these findings. When such is the case, there is no tenet of law preventing proper action by the hearing authority. *Ex Parte Wall, supra; Bradley* v. *Fisher,* 13 Wall 335, 80 U.S. 335. The Referee can draw all reasonable inferences from the evidence presented which reason and experience dictate. This would be true even if the instant proceedings were criminal but more so since they are not. *Tot* v. *United States,* 319

U.S. 463, 63 S. Ct. 1241; *Justice* v. *Lang,* 52 N.Y. 323; *People* v. *Terra,* 303 N.Y. 332, 102 N.E. 2d 576; *Matter of Mogel, supra; Matter of Broome, supra.*

The result of the Referee's conclusion had no penal effect and by no stretch of imagination could petitioner have been deemed guilty of a crime. These findings were within the function of the Referee and were carefully considered by the Appellate Division before its decision was rendered. The case of *In re Oliver,* 333 U.S. 257, cited by petitioner at page 23 of his brief is inapplicable. There the inquiry was being conducted by a "one man grand jury" and the defendant was not afforded an opportunity to be represented by counsel or have a full and fair hearing. The adjudication of contempt was also largely based on the testimony of one witness who had previously testified in secret and who was not subjected to cross examination by the defendant. Likewise in *Greene* v. *McElroy,* 360 U.S. 474, 79 S. Ct. 1400, cited by petitioner, the accused was also not permitted to confront or cross examine witnesses nor was he allowed to examine files, minutes or records on which the revocation of his security clearance was based. The procedures below were imminently fairer in this case than in any other case referred to by petitioner.

CONCLUSION

The petition for the Writ of Certiorari should be granted for the reasons referred to herein.

Dated: Brooklyn, New York
April 1, 1968

Respectfully submitted,

AARON E. KOOTA,
District Attorney,
Kings County

STANLEY M. MEYER,
Assistant District Attorney,
of Counsel.